

1 Relevant to the instant Motion, the Court granted Plaintiff's motion for TRO, enjoining
2 Mode Tech from producing, marketing, and selling products that infringe the '528 Patent and
3 authorizing Plaintiff to seize and impound infringing products with the aid of a U.S. Marshal.
4 (*See* Order Granting TRO 3:3–17, 3:22–5:8, ECF No. 9). The Court ordered that the U.S.
5 Marshal serve a copy of the Court's Order granting the TRO, summons, and Complaint, at
6 Mode Tech's place of business, with Mode Tech's agent, or "at the place where infringing
7 products are found, with any person of suitable age and discretion." (*Id.* 5:15–22). The Court
8 also set forth a briefing schedule on Plaintiff's motion for preliminary injunction and ordered
9 that Plaintiff post a \$1,000 bond. (*Id.* 3:13–20).

10 On October 23, 2018, Plaintiff filed proof of service indicating an employee of
11 Plaintiff's counsel effectuated in-person service upon David Liu ("Liu"), Mode Tech's booth
12 operator at the LDI Show. (Proof of Service 2:5–8, ECF No. 13). The filing also states Liu was
13 served twice through email, and that Mode Tech was served through federal express and
14 certified mail. (*Id.* 1:25–2:3, 2:10–18). Plaintiff subsequently withdrew the proof of service
15 and filed an affidavit from Shayla Whitaker ("Whitaker"), a licensed private investigator and
16 process server, specifying Liu was personally served at the LDI Show on October 20, 2018.
17 (Whitaker Aff., ECF No. 17-4). Plaintiff also filed a notice identifying the allegedly infringing
18 products Plaintiff seized from Mode Tech and items purportedly evidencing infringement. (*See*
19 Notice of Compliance, ECF No. 16).

20 The Court entered an order to show cause "as to why the Court's [TRO] should not be
21 dissolved for failure to effect service pursuant to the Court's [TRO]." (*See* Minute Order, ECF
22 No. 18). Plaintiff responded with an amended affidavit of service recounting the details of
23 Whitaker's personal service upon Liu and representing that the manner of service was
24 consistent with the Court's TRO. (Am. Aff. of Service, ECF No. 21).

1 The Court held a hearing on Plaintiff's motion for preliminary injunction at which the
2 Court extended the TRO by fourteen days. (*See* Mins. of Proceedings, ECF No. 22). On
3 October 30, 2018, Plaintiff withdrew its motion for preliminary injunction, stating that upon
4 inspection, the seized chain sprockets "do not appear to show that Mode Tech has infringed the
5 '528 Patent.'" (Notice of Withdrawal 2:5–9, ECF No. 23). Plaintiff later filed a notice
6 summarizing its efforts to return the non-infringing hoists to Mode Tech, which were
7 unsuccessful due to Plaintiff's inability to discover Mode Tech's contact information. (*See*
8 Notice, ECF No. 26). On November 14, 2018, in response to Plaintiff's counsel's prior emails,
9 Liu responded stating he would be in contact "soon" and would "check with [Mode Tech's]
10 attorney" as to the process for retrieving Mode Tech's seized items. (*See* Liu Email
11 Correspondence, Ex. 1 to Statute Report, ECF No. 27-1).

12 On February 11, 2019, Mode Tech filed the present Motion, seeking dismissal of this
13 action on the basis that Plaintiff's method of service is improper under the Federal Rules of
14 Civil Procedure. (*See* Mot. to Dismiss ("MTD"), ECF No. 30).

15 **II. LEGAL STANDARD**

16 **A. Rule 12(b)(5)**

17 A federal court does not have jurisdiction over a defendant unless the defendant has been
18 served properly under Federal Rule of Civil Procedure 4. *See Direct Mail Specialists, Inc. v.*
19 *Eclat Computerized Tech., Inc.*, 840 F.2d 685, 688 (9th Cir. 1988). As such, Rule 12(b)(5)
20 authorizes a defendant to move for dismissal due to insufficient service of process. *See* Fed. R.
21 Civ. P. 12(b)(5). The plaintiff has the burden of demonstrating that service of process was
22 valid. *See R. Griggs Grp. Ltd. v. Filanto Spa*, 920 F. Supp. 1100, 1102 (D. Nev. 1996). If
23 service of process is insufficient or otherwise invalid, the court has discretion to dismiss an
24 action or to simply quash service. *See* Fed. R. Civ. P. 4(m); *S.J. v. Issaquah Sch. Dist. No. 411*,
25 470 F.3d 1288, 1293 (9th Cir. 2006); *Filanto Spa*, 920 F. Supp. at 1102. Actual notice of a

lawsuit will not subject a defendant to personal jurisdiction “if service was not made in substantial compliance with Rule 4.” *Crowley v. Bannister*, 734 F.3d 967, 975 (9th Cir. 2013) (quotation omitted).

III. DISCUSSION

Mode Tech moves to dismiss on the basis that Plaintiff’s service of process was improperly effectuated. (*See generally* MTD, ECF No. 30). According to Mode Tech, Plaintiff’s service was deficient under Rule 4(h)(1)(B) because Plaintiff did not serve an authorized agent, and improper under Rule 4(f)(3) for lack of compliance with the procedures set forth by the Hague Convention, to which China is a signatory. (*Id.* 5:5–9:14).

Plaintiff disputes Mode Tech’s contentions, arguing that service of process was proper under both Rule 4(h)(1)(B) and 4(f)(3). (Pl.’s Resp. (“Resp.”) 5:1–9:17, ECF No. 41). Alternatively, Plaintiff requests an extension of time to properly serve Mode Tech in the event the Court concludes service was defective. (*Id.* 9:20–10:10).

A. Sufficiency of Service of Process

1) Rule 4(h)(1)(B)

Mode Tech contends that Plaintiff’s service ran afoul of Rule 4(h)(1)(B) because Liu has neither express nor implied authority to receive process on Mode Tech’s behalf. (MTD 7:9–24). Plaintiff argues that Mode Tech’s evidence of Liu’s position in the company—Liu’s Declaration—contains too many inaccuracies and inconsistencies to carry weight on the question of his authority to accept service of process. (Resp. 5:17–6:4).

Under Rule 4(h)(1)(B), a domestic or foreign corporation may be served “by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process.” Fed. R. Civ. P. 4(h)(1)(B). “Despite the language of the Rule, service of process is not limited solely to officially designated officers, managing agents, or agents appointed by law for the receipt of

1 process.” *See Direct Mail*, 840 F.2d at 688 (explaining that the rules governing service of
2 process “are to be applied in a manner that will best effectuate their purpose of giving the
3 defendant adequate notice.”). Accordingly, “service can be made ‘upon a representative so
4 integrated with the organization that he will know what to do with the papers. Generally,
5 service is sufficient when made upon an individual who stands in such a position as to render it
6 fair, reasonable and just to imply the authority on his part to receive service.’” *Id.* (quoting *Top*
7 *Form Mills, Inc. v. Sociedad Nazionale Industria Applicazioni Viscosa*, 428 F.Supp. 1237, 1251
8 (S.D.N.Y. 1977)).

9 Here, Mode Tech, for its part, has put forth Declarations from Liu and Su Hang, Mode
10 Tech’s sales manager and chief executive officer, respectively, establishing the scope of Liu’s
11 agency with respect to service of process. (*See* Liu Decl. ¶ 5, ECF No. 31); (Hang Decl. ¶ 3,
12 Ex. A to Reply, ECF No. 42-1). Liu declares that in his capacity as “ordinary sales person,”
13 Mode Tech prohibits him from receiving, or signing for, legal service of process. (Liu Decl. ¶¶
14 5–6). Hang’s Declaration echoes Liu’s testimony, stating Liu is a standard “sales
15 representative,” rather than an “officer, managing or general agent, or the registered agent,” and
16 is without authorization to accept service of process. (Hang Decl. ¶¶ 4–6).

17 Plaintiff, on the other hand, has not adduced evidence or put forth factual averments to
18 rebut these Declarations in any material way. For example, Plaintiff asserts that the Liu
19 Declaration misstates the process server’s gender and falsely claims Liu was not directly served
20 in person. (Resp. 5:23–6:4). The existence of these purported inaccuracies, however, does not
21 negate the uncontroverted evidence that Liu was not authorized to accept service on Mode
22 Tech’s behalf in the first instance.

23 Plaintiff also points out that Mode Tech has been on notice of the pendency of this
24 action since November 2018, shortly after the Court issued the TRO. While the Court
25 recognizes that “Rule 4 is a flexible rule that should be liberally construed so long as a party

1 receives sufficient notice of the complaint[,]” *United Food & Commercial Workers Union v.*
2 *Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir.1984), substantial compliance is nevertheless
3 required. *See Jes Solar Co. v. Chung*, 725 F. App’x 467, 471 (9th Cir. 2018) (“Service must be
4 completed ‘in substantial compliance with Rule 4’ even with actual notice.”) (quoting *Crowley*,
5 734 F.3d at 975). That is, notwithstanding Mode Tech’s notice of the pendency of this case,
6 Plaintiff must still make a showing that Liu was authorized to receive service of process for
7 Mode Tech or else that Liu’s position within Mode Tech is sufficiently consequential such that
8 it would be “fair, reasonable and just to imply the authority on his part to receive service.”
9 *Direct Mail*, 840 F.2d at 688. Because Plaintiff has not made such a showing, the Court is
10 without a basis to find substantial compliance under Rule 4(h)(1)(B).

11 **2) Rule 4(f)(3)**

12 Next, the parties dispute whether Mode Tech was properly served under Rule 4(f)(3).
13 (*See Resp. 8:1–9:17*); (*Reply 8:9–9:14*). Under this rule, an “individual . . . may be served at a
14 place not within any judicial district of the United States . . . by other means not prohibited by
15 international agreement, as the court orders.” Fed. R. Civ. P. 4(f)(3). “As obvious from its
16 plain language, service under Rule 4(f)(3) must be (1) directed by the court; and (2) not
17 prohibited by international agreement.” *Rio Props. v. Rio Int’l Interlink*, 284 F.3d 1007, 1014
18 (9th Cir. 2002).

19 Plaintiff contends that because Ninth Circuit courts have authorized service through
20 email on foreign corporations under Rule 4(f)(3), this Court should do the same. (*See Resp.*
21 *8:7–9:3*). Plaintiff’s position is without merit. This Court did not issue—and Plaintiff did not
22 seek—an order authorizing substituted service under Rule 4(f)(3). Because obtaining a Court
23 order is a prerequisite to application of Rule 4(f)(3), Plaintiff cannot rely upon this rule to
24 validate its attempted service. *See Brockmeyer v. May*, 383 F.3d 798, 808–09 (9th Cir. 2004)
25 (holding service of process ineffective under Rule 4(f)(3) where the plaintiffs failed to seek the

1 court's affirmative pre-authorization); *Neumont Univ., LLC v. Nickles*, 304 F.R.D. 594, 599 (D.
2 Nev. 2015) (“[Plaintiff] missed a critical step that prevents me from validating this 2012
3 substituted service: it never obtained a court order authorizing service via email before it sent
4 the August 16, 2012, transmission.”).

5 In summary, Plaintiff's attempt to serve Mode Tech through Liu neither satisfies Rule
6 4(h)(1)(B) nor Rule 4(f)(3). Nevertheless, the Court declines to dismiss the Complaint on this
7 basis, as Mode Tech requests. Instead, the Court will exercise its discretion by quashing
8 service and permitting Plaintiff to properly serve Mode Tech as directed below. *See Issaquah*
9 *Sch. Dist.*, 470 F.3d at 1293.

10 **B. Plaintiff's Request for Leave**

11 Plaintiff requests a seven-day extension of the service deadlines to serve Mode Tech
12 under Rule 4(f)(3). (Resp. 9:20–10:10). Specifically, Plaintiff seeks an order permitting
13 substituted service through which it may serve Mode Tech by emailing Liu and copying Mode
14 Tech's counsel on the correspondence. (*Id.* 10:1–10:10). Mode Tech opposes Plaintiff's
15 request on the ground that the instant suit is frivolous and in contravention of Rule 11. (Reply
16 9:17–12:15, ECF No. 42). Alternatively, Mode Tech urges the Court to require Plaintiff to
17 effect service pursuant the Hague Convention's procedures and Rule 4(f)(1). (*Id.* 12:16–24).

18 ***1) Extension of Time***

19 District courts retain broad discretion to permit service-of-process extensions under Rule
20 4(m). *See Mann v. Am. Airlines*, 324 F.3d 1088, 1090 (9th Cir. 2003). In considering whether
21 to grant an extension, “a district court may consider factors ‘like statute of limitations bar,
22 prejudice to the defendant, actual notice of a lawsuit, and eventual service.’” *Efaw v. Williams*,
23 473 F.3d 1038, 1041 (9th Cir.2007) (quoting *Troxell v. Fedders of N. Am. Inc.*, 160 F.3d 381,
24 383 (7th Cir.1998)).

1 The Court, in its discretion, will grant Plaintiff a seven-day extension of time to serve
2 Mode Tech. As noted above, there is no dispute that Mode Tech is currently on notice of this
3 action. Additionally, given the modest delay in this case, the Court cannot discern any
4 prejudice Mode Tech would suffer as a result of permitting Plaintiff to properly effectuate
5 service. The only prejudice Mode Tech identifies—having to defend against an allegedly
6 frivolous patent infringement suit—would be realized even if Plaintiff had properly effected
7 service. *Cf. Efaw*, 473 F.3d at 1041. Stated differently, to the extent Mode Tech is prejudiced,
8 it is not attributable to Plaintiff’s failure to comply with applicable service-of-process
9 requirements.

10 **2) *Substituted Service by Email***

11 “The decision whether to allow alternative methods of serving process under Rule
12 4(f)(3) is committed to the ‘sound discretion of the district court.’” *Brockmeyer*, 383 at 805 (9th
13 Cir. 2004) (quoting *Rio Props.*, 284 F.3d at 1016). Service under this rule must “comport with
14 constitutional notions of due process,” which require that the method of service be “reasonably
15 calculated, under all the circumstances, to apprise interested parties of the pendency of the
16 action and afford them an opportunity to present their objections.” *Rio Props.*, 284 F.3d at 1016
17 (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)).

18 The Court finds it appropriate to permit Plaintiff’s service upon Liu and Mode Tech’s
19 counsel through email. Plaintiff points out that Mode Tech is a Chinese company with no
20 regular presence in the United States and despite three attempts, Plaintiff has been unsuccessful
21 at serving Mode Tech consistent with the Federal Rules of Civil Procedure. (Resp. 8:15–9:17).
22 These efforts satisfy the Court that “the facts and circumstances of the present case
23 necessitate[] the district court’s intervention,” with respect Rule (4)(f)(3) service. *Rio Props.*,
24 284 F.3d at 1016.

1 The Court further finds that service by email is reasonably calculated to apprise Mode
2 Tech of the pendency of this action. Indeed, there is no dispute that Mode Tech is presently on
3 notice of this action. (*See generally* MTD); (*see also* Hang Decl. ¶ 3, Ex. A to Reply, ECF No.
4 42-1). It is also undisputed that prior to Mode Tech filing the present Motion to Dismiss,
5 Plaintiff and Liu exchanged email messages on the email address to which Plaintiff seeks to
6 address Court-ordered service. (*See* Liu Email Correspondence, Ex. 1 to Statute Report, ECF
7 No. 27-1). These uncontroverted facts persuade the Court that service upon Liu and Mode
8 Tech’s counsel through email easily meets the threshold of being “reasonably calculated” to put
9 Mode Tech on notice of this action and to allow Mode Tech an opportunity to mount a defense.
10 *See Rio Props.*, 284 F.3d at 1014–19 (authorizing service upon foreign entity’s U.S. counsel
11 under Rule 4(f)(3) where it “seemed clear” counsel was in contact his client); *In Re TFT-LCD*
12 *(Flat Panel) Antitrust Litig.*, No. M07-1827 SI, 2010 WL 1337743, at *3 (N.D. Cal. Apr. 2,
13 2010) (“[T]he Court finds it reasonable to infer that Chunghwa has sufficient notice of this case
14 and that service of defendant through its U.S. counsel will comport with due process.”); *see*
15 *also Fru Veg Mktg., Inc. v. Vegfruitworld Corp.*, 896 F. Supp. 2d 1175, 1182 (S.D. Fla. 2012)
16 (collecting cases).

17 The Court declines to order that Plaintiff effect service pursuant to the Hague
18 Convention and its corresponding requirements, as Mode Tech urges. (*See* Reply 12:16–14).
19 Rule 4(f)(3), like any other method of service under Rule 4(f), “is merely one means among
20 several which enables service of process on an international defendant.” *Rio Props.*, 284 F.3d at
21 1015. Applying this rationale, the Ninth Circuit Court of Appeals has expressly rejected the
22 argument that a party requesting service under Rule 4(f)(3) must first exhaust all feasible
23 alternative means of service. *Id.* at 1014–15. This Court, likewise, rejects Mode Tech’s request
24 and will permit Plaintiff to serve Liu and Mode Tech’s counsel via email.

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1 **IV. CONCLUSION**

2 **IT IS HEREBY ORDERED** that Mode Tech's Motion to Dismiss, (ECF No. 30), is
3 **GRANTED in part** and **DENIED in part**. The Motion is **GRANTED** insofar as it requests
4 that Plaintiff's service of the Complaint, summons, and TRO be quashed pursuant to Rule
5 12(b)(5). Mode Tech's Motion is **DENIED** with respect to the request for dismissal for failure
6 to effectuate service of process.

7 **IT IS FURTHER ORDERED** that pursuant to Plaintiff's request, Plaintiff shall have
8 seven (7) days from the filing of this Order to serve Liu and Mode Tech's counsel by email
9 addressed to junling_li@modehoist.com. Plaintiff shall serve a copy of the summons,
10 Complaint, and the Court's Order granting Plaintiff's Motion for TRO. Plaintiff shall file proof
11 of service with the Court within ten (10) days after service is effectuated.

12 **DATED** this 3 day of August, 2019.

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16 Gloria M. Navarro, Chief Judge
17 United States District Judge
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